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10 defendant, BIOMAGIC, INC.; and
11 Counterdefendants JANICE ALFREY
12 and PAUL ALFREY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

BIOMAGIC, INC., a Delaware
corporation,

Plaintiff,

v.

DUTCH BROTHERS ENTERPRISES,
LLC, an Idaho limited liability
company, AGRAKEY SOLUTIONS,
INC., an Idaho limited liability
company, and JOHN REITSMA, an
individual, and DOES 1 to 10,

Defendants.

DUTCH BROTHERS ENTERPRISES,
LLC, an Idaho limited liability
company, and AGRAKEY
SOLUTIONS, LLC, an Idaho limited
liability company,

Counterclaimants,

v.

BIOMAGIC, INC. a Delaware
corporation, JANICE ALFREY, an
individual, and PAUL ALFREY, an
individual,

Counterdefendants.

CASE NO.: SACV 10-00290 AG
(RNBx)

JUDGE: Honorable Andrew J.
Guilford

~~PROPOSED~~ STIPULATED
PROTECTIVE ORDER

1 **STATEMENT OF GOOD CAUSE**

2 Discovery and trial of this case may involve the exchange of confidential
3 information and/or other proprietary information of the parties. Such information
4 may include certain documents, information (including electronically stored
5 information), tangible objects, and things that may be produced during discovery in
6 this proceeding and may include product designs, product development histories,
7 customer lists, marketing surveys, competition analysis, product sales, drafts of
8 marketing materials, business strategies, and financial data not available to the
9 public information such as prices, profit margins, gross margins, and costs. The
10 parties agree that disclosure to the public of such confidential and/or proprietary
11 information may be detrimental to their respective commercial interests.
12 Therefore, the parties have agreed to enter into this [Proposed] Stipulated
13 Protective Order ("Protective Order").

14 **PROTECTIVE ORDER**

15 WHEREAS, in connection with the above-captioned matter, certain
16 information, documents and things containing confidential business information
17 within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure may be
18 disclosed by the parties and/or non-parties voluntarily and/or in response to
19 discovery demands;

20 WHEREAS, it would serve the interests of the parties to conduct discovery
21 relating to this proceeding under a Protective Order pursuant to Rule 26(c) of the
22 Federal Rules of Civil Procedure;

23 WHEREAS, the parties have agreed to be bound by the terms of this
24 Protective Order and to present the same for entry as an Order of the Court; and

25 WHEREAS, the parties agree that non-parties may join in this Protective
26 Order and receive the benefits and be subject to the obligations thereof upon
27 written notice:

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IT IS HEREBY STIPULATED AND AGREED THAT:

1. This Protective Order shall apply to all information, documents, testimony and things produced, disclosed, or filed in this action and any appeal, by or on behalf of any party or third party, voluntarily or involuntarily, whether pursuant to formal or informal discovery requests, subpoena, deposition notice, or motion practice, and whether revealed in a document, deposition, response to any type of written discovery, submission to this Court or otherwise (“Litigation Material.”) Any party or third party may designate any Litigation Material ~~CONFIDENTIAL~~ or ~~HIGHLY CONFIDENTIAL–ATTORNEY’S EYES ONLY~~ as provided in this Protective Order. As used herein, “Designated Information” means any information, documents, testimony and other Litigation Material designated either “CONFIDENTIAL” or “~~HIGHLY CONFIDENTIAL–ATTORNEY’S EYES ONLY.~~”

2. All Designated Information is provided solely for the prosecution or defense of this action and any appeal and may not be used for any other purpose, except by leave of court upon noticed motion with notice to all interested parties.

3. Any Litigation Material which is deemed by a party or by a non-party to disclose that party or non-party’s Designated Information will be so identified and labeled as either ~~CONFIDENTIAL~~ or ~~HIGHLY CONFIDENTIAL–ATTORNEY’S EYES ONLY~~ as follows:

a. A party or non-party may designate Litigation Material ~~CONFIDENTIAL~~ only if it, in concurrence with its counsel and in good faith, deems that the Litigation Material contains confidential or other proprietary information that is not generally available to the public and that a reasonable basis exists for limiting dissemination of the material under the standards of FRCP 26. Litigation Material designated ~~CONFIDENTIAL~~ shall include any copy or other reproduction, excerpts, summaries, abstracts, or other documents that paraphrase, quote, or contain ~~CONFIDENTIAL~~ information.

1 b. A party or non-party may designate Litigation Material HIGHLY
2 CONFIDENTIAL-ATTORNEY'S EYES ONLY if it, in concurrence with its
3 counsel and in good faith, determines that the Litigation Material contains
4 proprietary or other highly sensitive commercial or competitive information whose
5 disclosure would raise a material risk of (i) present or future competitive injury to
6 the designating party or (ii) present or future competitive or commercial advantage
7 to the receiving party or non-parties.

8 c. In the case of information voluntarily disclosed in these proceedings
9 or disclosed as a result of discovery, the producing party or non-party will identify
10 any designated Litigation Material at the time of disclosure.

11 d. In the case of a deposition, any party or non-party may orally
12 designate at the deposition any portion of the testimony as CONFIDENTIAL or
13 HIGHLY CONFIDENTIAL-ATTORNEY'S EYES ONLY subject to the terms of
14 paragraphs 3(a) and 3(b) above. Further, any party or non-party may further
15 designate any portion of the deposition transcript as CONFIDENTIAL or
16 HIGHLY CONFIDENTIAL-ATTORNEY'S EYES ONLY within thirty (30) days
17 after receipt of the transcript. The party or non-party making such additional
18 designation shall advise opposing counsel and the Court Reporter of the additional
19 designation by letter making reference to the specific pages and exhibits to be so
20 designated. The Court Reporter shall then mark the face of the transcript
21 containing such confidential testimony and/or exhibits CONFIDENTIAL
22 PURSUANT TO COURT ORDER or HIGHLY CONFIDENTIAL-
23 ATTORNEY'S EYES ONLY PURSUANT TO COURT ORDER, as appropriate.

24 4. Inadvertent failure to designate Designated Information as such prior
25 to disclosure, production or response will not prevent a subsequent confidentiality
26 designation by letter promptly sent after discovery of such inadvertent failure,
27 provided that any disclosure made by the receiving party prior to receipt of the
28 letter shall not be a violation of this Protective Order, nor shall the receiving party

1 incur liability for use or disclosure of the information prior to the receipt of such
2 letter.

3 5A. Unless and until the Court rules that any Litigation Material so
4 identified as CONFIDENTIAL is not, in fact, worthy of treatment as such and
5 should be disclosed beyond the limits permitted by this Protective Order, access,
6 copying or dissemination of Litigation Material so designated shall be limited to:

7 a. Outside Counsel of Record and their partners, associates, and their
8 employees (including stenographic, clerical and paralegal employees) and outside
9 copy services whose functions require access to such Designated Information and
10 who agree in writing to be bound by the terms of this Protective Order;

11 b. Independent experts or consultants retained by a party, and their
12 clerical employees who are not and were not employees of the parties or their
13 affiliates, and whose advice, consultation and/or testimony are being or will be
14 used by the parties in connection with preparation for trial of this action and/or any
15 motions or appeals connected with the action. However, prior to the disclosure of
16 Designated Information under this paragraph the expert or consultant must execute
17 Exhibit A.

18 c. Persons appearing for deposition provided that such persons: (1)
19 authored or received such Designated Information; (2) are established as being
20 knowledgeable of the contents of such Designated Information prior to the time of
21 his or her testimony; or (3) are a current or former employee of the party (or non-
22 party) that produced the Designated Information.

23 d. The Court and its officers (including court reporters);

24 e. Any other person that the parties hereto (or the designating non-party)
25 agree to in writing; and

26 f. Such officers, directors, or employees of the parties, as counsel, in
27 good faith, determines are necessary to provide assistance in the prosecution or

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1 defense of this action, and who have signed the agreement to be bound by the
2 Protective Order that is attached as Exhibit A to the Protective Order.

3 5B. Unless and until the Court rules that any Litigation Material so
4 identified as **HIGHLY CONFIDENTIAL--ATTORNEY'S EYES ONLY** is not, in
5 fact, worthy of treatment as such and should be disclosed beyond the limits
6 permitted by this Protective Order, access, copying or dissemination of Litigation
7 Material so designated shall be limited to:

8 a. Outside Counsel of Record and their partners, associates, and their
9 employees (including stenographic, clerical and paralegal employees) and outside
10 copy services whose functions require access to such Designated Information and
11 who agree in writing to be bound by the terms of this Protective Order;

12 b. Independent experts or consultants retained by a party, and their
13 clerical employees who are not and were not employees of the parties or their
14 affiliates, and whose advice, consultation and/or testimony are being or will be
15 used by the parties in connection with preparation for trial of this action and/or any
16 motions or appeals connected with the action. However, prior to the disclosure of
17 Designated Information under this paragraph the expert or consultant must execute
18 Exhibit A.

19 c. Persons appearing for deposition provided that such persons: (1)
20 authored or received such Designated Information; (2) are established as being
21 knowledgeable of the contents of such Designated Information prior to the time of
22 his or her testimony; or (3) are a current or former employee of the party (or non-
23 party) that produced the Designated Information.

24 d. The Court and its officers (including court reporters); and

25 e. Any other person that the parties hereto (or the designating non-party)
26 agree to in writing.

27 6. In accordance with Local Rule 79-5.1, if any papers to be filed with
28 the Court contain information and/or documents that have been designated as

1 “Confidential” or “Highly Confidential - Attorneys’ Eyes Only,” the proposed
2 filing shall be accompanied by an application to file the papers or the portion
3 thereof containing the designated information or documents (if such portion is
4 segregable) and if appropriate the application itself under seal; and the application
5 shall be directed to the judge to whom the papers are directed. For motions, the
6 parties shall publicly file a redacted version of the motion and supporting papers.

7 7. A party reserves the right to challenge whether any of the other
8 parties’ Designated Information within the scope of protection afforded by this
9 Protective Order or that Litigation Material designated as HIGHLY
10 CONFIDENTIAL–ATTORNEY’S EYES ONLY should be reclassified as
11 CONFIDENTIAL. The party challenging such Designated Information shall be
12 made in strict compliance with the procedural and timing requirements of Local
13 Rules 37-1 and 37-2 (including the Joint Stipulation requirement). Further:

14 a. A party does not waive its right to challenge a designation of
15 CONFIDENTIAL or HIGHLY CONFIDENTIAL–ATTORNEY’S EYES ONLY
16 by electing not to mount a challenge immediately after the original designation is
17 made;

18 b. A party that elects to initiate a challenge as to any Designated
19 Information must do so in good faith and must begin the process by conferring
20 directly with counsel for the party, or non-party, making such designation; and

21 c. Each Party that designates information or items for protection under
22 the Protective Order must take care to limit any such designation to specific
23 material that qualifies under the appropriate standards, including designating
24 protected information on a page by page, paragraph by paragraph, or item by item
25 basis, at the lowest reasonable level of protection so that (a) only those parts of
26 material, documents, items, or oral or written communications are designated that
27 qualify under the appropriate standards, and (b) other portions of the material,

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1 documents, items, or communications for which protection is not warranted are not
2 swept unjustifiably within the ambit of this Order;

3 d. Mass, indiscriminate, or routinized designations are prohibited.
4 Designations that are shown to be clearly unjustified, or that have been made for an
5 improper purpose (e.g., to unnecessarily encumber or retard the case development
6 process, or to impose unnecessary expenses and burdens on other parties), expose
7 the Designating Party to being assessed fees and costs for abusing its designations.

8 e. All disputes regarding designations will be resolved by the trial court
9 judge or magistrate by noticed motion with the parties agreeing to waiting only
10 eleven (11) days as opposed to the 21 day waiting period for filing a motion after
11 the meet and confer, as required by Local Rule, 7-3, or as otherwise ordered by the
12 Court.

13 8. This Protective Order shall not prevent any party or non-party from
14 applying to the Court for relief herefrom or for further and/or additional protective
15 orders, and/or from agreeing between themselves, subject to approval of the Court,
16 to modification of this Protective Order.

17 9. Subject to the limitations of this Protective Order, Designated
18 Information identified in accordance with paragraph 3 hereto may be used in this
19 lawsuit during discovery, in connection with any motion, at the trial and/or appeal
20 of this action, and for any other purpose as this Court may allow after notice to all
21 parties.

22 10. If any Designated Information is disclosed, inadvertently or otherwise, to a
23 person or party not entitled to receive such Designated Information under the terms
24 of this Protective Order, the party or non-party that disclosed the Designated
25 Information shall (a) promptly inform the person to whom disclosure was made of
26 all the provisions of this Protective Order; (b) immediately inform the designating
27 party about all circumstances of the improper disclosure, including what
28 Designated Information was improperly disclosed and to whom it was disclosed;

1 (c) request the person to whom disclosure was made to sign the acknowledgment
2 set forth in Exhibit A of this Protective Order; and (d) serve the original signed
3 acknowledgment on the designating party.

4 11. The inadvertent or unintentional production of Litigation Material
5 which a party or non-party later claims should not have been produced because of
6 a privilege, including but not limited to attorney-client privilege or work product
7 immunity, will not be deemed to waive any privilege. A party or non-party may
8 request the return of such privileged materials by identifying the material and the
9 basis for the claim of privilege. If a party or non-party requests the return of such
10 material, the party having custody of the material shall return it and all copies
11 within five (5) calendar days.

12 12. Nothing in this Protective Order shall prejudice or waive the right of
13 any party to object to the production of any document upon any appropriate
14 ground, including any applicable privilege. Moreover, nothing in this Protective
15 Order shall prejudice or waive the right of any party to object to the admissibility
16 of any Litigation Material or other evidentiary material on any appropriate ground.
17 Entering into and/or complying with this Protective Order shall not: (a) operate as
18 an admission by any party that any particular Litigation Material contains or
19 reflects currently protected proprietary or commercial information, or (b) operate
20 as an admission by any party that any particular Litigation Material is, or is not,
21 relevant to this action.

22 13. Within thirty (30) days after final termination of this case and any
23 appeal, receiving counsel shall return all copies and samples of Designated
24 Information in its possession, custody or control to counsel for the party who has
25 provided them or certify destruction thereof. Counsel for each of the parties is
26 permitted to retain, subject to the continued restrictions of this Protective Order,
27 one copy of any document filed with the Court.

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1 14. No copy of any deposition transcript or any portion identified as
2 Designated Information shall be prepared or furnished by the reporter to any
3 person other than to attorneys of record for the parties. Neither the original nor any
4 copy of any transcript of any deposition taken in this action shall be filed in Court
5 until the time period has elapsed for the designation of portions of the transcript as
6 Designated Information, unless the transcript and all papers referencing the
7 transcript are filed under seal.

8 15. In the event that a party or non-party to whom Designated Information
9 has been disclosed receives a discovery request, subpoena, order or other form of
10 compulsory process requiring that it (the "subpoenaed party") produce Designated
11 Information, the subpoenaed party shall promptly notify the designating party of
12 the demand. If the designating party elects to resist production of the materials, it
13 shall promptly so notify the subpoenaed party and the latter shall cooperate in
14 affording the designating party the opportunity to oppose or limit production of the
15 materials provided. However, nothing in this Protective Order is intended to be
16 construed as authorizing a party to disobey a lawful subpoena issued in another
17 action.

18 16. This Protective Order shall survive the final determination of this
19 action and shall remain in full force and effect after the conclusion of all of the
20 proceedings herein and the Court will retain jurisdiction to enforce its terms and to
21 ensure compliance herewith.

22 17. This Protective Order has no effect upon, and shall not apply to, a party's
23 use or disclosure of its own Designated Information for any purpose. Also,
24 nothing contained herein shall impose any restrictions on the use or disclosure by
25 the Receiving Party of information that: (a) the Receiving Party can prove was
26 already known to such party by lawful means prior to its disclosure by the
27 Designating Party in this action; (b) is or becomes publicly known through no fault
28 of the Receiving Party; or (c) is rightfully received by the Receiving Party from a

1 third party which has authority to provide such information and who is without
2 restriction on the use or disclosure of such information.

3 **SO STIPULATED.**

4 **FISH & ASSOCIATES, PC**

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6 Dated: July 16, 2010

By: /s/ Mei Tsang
Mei Tsang, Esq.
Attorneys for Plaintiff and
Counterdefendants BIOMAGIC, INC.
and Counterdefendants JANICE ALFREY
and PAUL ALFREY

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11 **KNOBBE, MARTENS, OLSON & BEAR, LLP**

12 Dated: July 16, 2010

By: /s/ Darrell L. Olson
Darrell L. Olson, Esq.
Attorneys for Defendants/Counterclaimants
DUTCH BROTHERS ENTERPRISES, LLC;
AGRAKEY SOLUTIONS, LLC; and
Defendant JOHN REITSMA

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18 IT IS SO ORDERED.

19 Date: July 19, 2010

20 **ROBERT N. BLOCK**

21 Robert N. Block
22 United States Magistrate Judge
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